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Nos. 82-1331 & 82-1352

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1982

LOUISIANA PUBLIC SERVICE COMMISSION,  
v. *Petitioner,*  
FEDERAL COMMUNICATIONS COMMISSION, *et al.,*  
*Respondents.*

NATIONAL ASSOCIATION OF REGULATORY  
UTILITY COMMISSIONERS, *et al.,*  
v. *Petitioners,*  
FEDERAL COMMUNICATIONS COMMISSION, *et al.,*  
*Respondents.*

On Petitions for a Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

**BRIEF OF COMPUTER AND BUSINESS EQUIPMENT  
MANUFACTURERS ASSOCIATION IN OPPOSITION**

JOHN S. VOORHEES, P.C.  
HOWREY & SIMON  
1730 Pennsylvania Ave., N.W.  
Suite 900  
Washington, D.C. 20006  
(202) 783-0800

April 15, 1983

\* Counsel of Record

JOSEPH M. KITTNER \*  
CARL R. RAMEY  
McKENNA, WILKINSON  
& KITTNER  
1150 Seventeenth St., N.W.  
Washington, D.C. 20036  
(202) 861-2600

*Counsel for Computer and  
Business Equipment  
Manufacturers Association*

## **QUESTION PRESENTED**

Whether the court of appeals correctly held that the Federal Communications Commission acted within its established authority when it decided to detariff customer premises equipment connected to the interstate telecommunications network and used jointly in interstate and intrastate communications even though this action effectively displaces inconsistent state regulation.

## **PARTIES TO THE PROCEEDING IN THE COURT BELOW**

The following is a list of all parties that appeared before the court whose judgment is sought to be reviewed:

Aeronautical Radio, Inc.  
Alabama Public Service Commission  
Alarm Industry Telecommunications Committee of  
the National Burglar Fire Alarm Association  
American Business Press, Inc.  
American Newspaper Publishers Association  
American Petroleum Institute  
American Telephone and Telegraph Company  
Association of Data Processing Service  
Organizations, Inc.  
Bunker Ramo Corporation  
Central Telephone Utilities Corporation  
Citicorp  
Computer and Business Equipment Manufacturers  
Association  
Communications Satellite Corporation  
Comsat General Corporation  
Continental Telephone Corporation  
Central Data Corporation  
Datapoint Corporation  
Department of Public Service of the State  
of Minnesota

Department of Public Utility Control Authority of  
 the State of Connecticut  
 Federal Communications Commission  
 Henry Geller  
 GTE Service Corporation  
 GTE Telenet Communications Corporation  
 Hazeltine Corporation  
 Honeywell, Inc.  
 Independent Data Communications  
 Manufacturers Association, Inc.  
 IBM Corporation  
 ISA Communications Services, Inc.  
 Louisiana Public Service Commission  
 The Maine Public Utilities Commission  
 MCI Telecommunications Corporation  
 Motorola, Inc.  
 Municipality of Anchorage d/b/a Anchorage  
 Telephone Utility  
 National Association of Regulatory Utility  
 Commissioners  
 National Newspaper Association  
 New York State Consumer Protection Board  
 North American Telephone Association  
 Office of Consumers Utility Counsel, State of Georgia  
 Office of People's Counsel of Maryland  
 Oklahoma Corporation Commission  
 The People of the State of California and the Public  
 Utilities Commission of the State of California  
 Public Advocate of Delaware  
 The Public Service Commission of Wisconsin  
 RCA Global Communications, Inc.  
 Satellite Business Systems  
 Southern Pacific Communications Corporation  
 Sperry Univac Division of Sperry Corporation  
 State of Arkansas  
 The State Corporation Commission of the  
 State of Kansas  
 Tymnet, Inc.  
 United Computing Systems, Inc.

United States Department of Justice  
 United Telephone Systems, Inc.  
 U.S. Telephone and Telegraph Corporation  
 Utilities Telecommunications Council  
 Western Union Telegraph Company  
 Wisconsin Telecommunications Contractors  
 Association  
 Xerox Corporation

In light of the purposes of Rule 28.1, we construe the terms "parent companies", "subsidiaries" and "affiliates" to mean those corporations (1) whose shares are publicly traded; (2) in the case of "parent companies", which own a majority of the shares of a party; and (3) in the case of "subsidiaries and affiliates", a majority of whose shares are owned by a party.

The member companies (or corporate parents of affiliates of member companies) of the Computer and Business Equipment Manufacturers Association that are publicly traded in the United States are as follows: 3 M; AMP Incorporated; Apple Computer Inc.; Bell & Howell, Phillipsburg Division; Burroughs Corporation; Control Data Corporation; Pitney Bowes (whose subsidiary Dictaphone Corporation is also a member company); Digital Equipment Corporation; EXXON (whose division, EXXON Enterprises, is the member company); Eastman Kodak Company; GF Business Equipment, Inc.; General Binding Corporation; GenRad, Inc.; Hewlett-Packard Company; Honeywell, Inc. (whose divisions, Honeywell Information Systems, Inc. and Micro Switch, are the member companies); IBM Corporation; Lanier Business Products, Inc.; NCR Corporation; North Star Computer, Inc.; Phillips Business Systems, Inc.; Prime Computer, Inc.; Sanders Associates, Inc.; Sperry UNIVAC; TRW, Incorporated; Tektronix, Inc.; Texas Instruments Incorporated; and Xerox Corporation.

The following member companies of the Computer and Business Equipment Manufacturers Association are ei-

ther not publicly owned or are affiliated with or owned by companies that are not publicly traded in the United States: Acme Visible Records, Inc.; Contitronix, Incorporated; ICL, Incorporated; Docutel/Olivetti Corporation; Sony Corporation of America; The Standard Register Company; Lexor Corporation; Multigraphics, a Division of AM International, Inc.; Panasonic Industrial Company; Quality Micro Systems, Inc.; Royal Business Machines, Inc.; Topaz, Inc.; and UARCO Incorporated.

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**BRIEF OF COMPUTER AND BUSINESS EQUIPMENT  
MANUFACTURERS ASSOCIATION IN OPPOSITION**

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Respondent Computer and Business Equipment Manufacturers Association ("CBEMA") respectfully requests that this Court deny the Petitions for Writ of Certiorari filed herein on February 9 and 10, 1983, by the Louisiana Public Service Commission and the National Association of Regulatory Utility Commissioners, *et al.*, respectively, seeking to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on November 12, 1982.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 693 F.2d 198. The court's opinion appears in the Appendix to the Petition of the Louisiana Public Service Commission at pp. A-1 - A-47.<sup>1</sup>

The administrative orders constituting the *Computer II*<sup>2</sup> decision consist of the Commission's *Final Decision*, 77 FCC 2d 384 (1980) ("Final Decision"), released May 2, 1980, and its *Memorandum Opinion and Order on Reconsideration*, 84 FCC 2d 50 (1980) ("Reconsideration Order") released December 30, 1980. Those orders also refer to and rely on a *Tentative Decision and Further Notice of Inquiry and Rulemaking*, 72 FCC 2d 358 (1979) ("Tentative Decision"), released July 1, 1979. On October 30, 1981, the Commission also released a *Memorandum Opinion and Order on Further Reconsideration*, 88 FCC 2d 512 (1981) ("Second Reconsideration Order").

## JURISDICTION

The judgment of the court of appeals was entered on November 12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

## STATUTORY PROVISIONS INVOLVED

Sections 151 and 152 of the Communications Act of 1934, 47 U.S.C. §§ 151 and 152, as amended, appear in an Appendix hereto.

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<sup>1</sup> Hereinafter, the Appendix to the petition of the Louisiana Public Service Commission containing the opinion of the court of appeals will be cited as "Pet. App. at —."

<sup>2</sup> *Computer II* is a short-hand reference commonly used throughout the long history of an FCC rulemaking proceeding entitled "In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)."

## STATEMENT OF THE CASE

### A. The Commission's Computer II Decision

In the words of the court of appeals, "[r]esponding to monumental changes in the technological and economic conditions of the communications marketplace, the Commission in *Computer II* overhauled the regulatory regime governing the interrelationship of telecommunications and data processing." Pet. App. at A-10, 693 F.2d at 202.<sup>3</sup>

At the heart of *Computer II* are the policies adopted respecting customer premises equipment ("CPE"),<sup>4</sup> "basic" transmission services, and "enhanced" services<sup>5</sup>—with

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<sup>3</sup> The Commission first addressed the regulatory and policy problems posed by the growing interdependence of data processing and communications in a proceeding commenced in 1966 (*First Computer Inquiry or Computer I*). See *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 FCC 2d 291 (1970) ("Tentative Decision"); 28 FCC 2d 267 (1971) ("Final Decision"), *aff'd, in part, sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), decision on remand, 40 FCC 2d 293 (1973).

<sup>4</sup> CPE is defined by the Commission as including all equipment provided by common carriers and located on customer premises *except* over voltage protection equipment, inside wiring (to effectuate connections with the transmission network), coin operated or pay telephones, and multiplexing equipment to deliver multiple channels to the customer. *Reconsideration Order*, 84 FCC 2d at 61. As such, CPE includes such devices as the common residential telephone, computer terminals, answering devices, and private branch exchanges (PBXs).

<sup>5</sup> "Basic" service is defined by the Commission as "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Final Decision*, 77 FCC 2d at 420. "Enhanced" services are defined as a residual category: "[a]n enhanced service is any offering over the telecommunications network which is more than a basic transmission service." *Id.* Examples of "enhanced services" include information services such as those which provide stock market quotations, legal data retrieval, current real estate listings, and the Dow Jones news services.

CPE and enhanced services being segregated from the scope of traditional common carrier regulation under Title II of the Communications Act.

The subject petitions are directed to that portion of the *Computer II* decision which removes from tariff regulation all CPE used for interstate communications. Thus, whereas CPE has, in recent years, been supplied by both unregulated equipment vendors (on an untariffed basis) and common carriers (under tariff, as part of their basic communications package), *Computer II* will permit carriers to continue to offer CPE only as a non-tariffed item. *Final Decision*, 77 FCC 2d at 435-47. The Commission's rationale for this particular regulatory measure was as follows: CPE is readily severable from basic utility service, there are multiple vendors for most types of terminals today, tariff regulation might inhibit effective competition, and the continued "bundled" offering of terminal equipment with basic service (by common carriers) might facilitate harmful cross subsidies and disguise the true cost elements of a complete service. *Final Decision*, 77 FCC 2d at 438.

Having thus found that the carriers' historical practice of packaging CPE with transmission service and offering the package for a bundled, tariffed rate impeded competition and adversely affected communications users, the Commission accordingly concluded that "the objectives of the Communications Act would best be fulfilled by deregulating all CPE." *Reconsideration Order*, 84 FCC 2d at 98. As the Commission clearly recognized, this aspect of its decision effectively precludes states from regulating, as they have in the past, the charges for terminal equipment used jointly in the provision of intrastate and interstate services: "Divided regulation of equipment charges is not feasible if the equipment charges are unbundled from both interstate and intrastate services." *Final Decision*, 77 FCC 2d at 455. It is this preemptive effect that is the focal point of the pending petitions before this Court.

### B. The Court Of Appeals Decision

On appeal under 47 U.S.C. § 402(a) (1976), the court of appeals unanimously<sup>6</sup> affirmed the Commission's decision in all respects.

On the preemption issue, the court found that continued state tariffing of CPE would severely frustrate the objectives of the overall *Computer II* scheme and must, as such, yield to the federal regulatory program:

"Courts have consistently held that when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme."<sup>7</sup>

Moreover, "[g]iven the Commission's detailed and logical findings on this point,"<sup>8</sup> the court declined to be drawn into a policy-making role of its own. Rather, it said:

"We cannot engage in debate about whether a policy of price control through tariffing or a policy of free competition best serves the public interest in this area. All we are empowered to do is to determine whether the Commission had the statutory authority to adopt the policy it did and whether that policy is arbitrary or capricious or an abuse of discretion. We believe that Congress has empowered the Commission to adopt policies to deal with new developments in the communications industry and that the policy favoring regulation by marketplace forces embodied in *Computer II* is neither arbitrary, capricious, nor

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<sup>6</sup> Circuit Judge Edwards did not participate in the final disposition of the case. Pet. App. at A-9, 693 F.2d at 202.

<sup>7</sup> Pet. App. at A-35, 693 F.2d at 214 (citations omitted).

<sup>8</sup> *Id.*

an abuse of discretion. With this holding our review of the wisdom of state preemption is at an end.”<sup>9</sup>

On February 9, 1983 and February 10, 1983, respectively, the Louisiana Public Service Commission (“LPSC”) and the National Association of Regulatory Utility Commissioners, *et al.* (“NARUC”), petitioned this Court for a writ of certiorari to review the decision of the court of appeals with respect to the preemption issue only.

### ARGUMENT

The regulatory program initiated by *Computer II* involves a number of vital and interrelated issues affecting our national telecommunications system. The Commission and the court of appeals have rendered comprehensive and dispositive opinions on all of those issues. Petitioners in this Court attack the resolution of but one issue—whether state regulation of CPE used in both interstate and intrastate communications must yield to the overall federal regulatory program.<sup>10</sup>

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<sup>9</sup> Pet. App. at A-40 - A-41, 693 F.2d at 217.

<sup>10</sup> The practical conflict arises in this case because most CPE is connected to the interstate telephone network and used interchangeably for both interstate and intrastate communications. Moreover, the Communications Act gives both the federal government and the states certain authority with respect to communications. First, Section 2(a) gives the FCC jurisdiction over “all *interstate and foreign communication* by wire or radio and . . . [over] all persons engaged within the United States in such communication . . .” At the same time, Section 2(b) reserves to the states jurisdiction with respect to “charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate communication service*. . .” 47 U.S.C. §§ 152(a), (b) (1976) (emphasis added). Taken together, the two provisions establish that the Commission has authority over all interstate communications and the states have authority over purely intrastate communications—but they do not, on their face at least, resolve the question of ultimate authority when interstate and intrastate communications are, as here, not severable. Rather, as the remaining text demonstrates, that question has been definitively settled by longstanding judicial precedent.

Petitioners fail to present any persuasive reasons why the decision below should be reviewed by this Court. The court of appeals decision is fully consistent with general principles of federal preemption established by prior decisions of this Court, no other important question of federal law is presented, and there is no conflict within the circuits on the question raised. Indeed, the sole question urged by Petitioners—whether Section 2(b) of the Communications Act precludes the Commission from preempting state regulation of dual-use CPE—has been uniformly and correctly resolved in the Commission’s favor in all the circuits where the question has been addressed.

# **I. THE DECISION BELOW COMPORTS FULLY WITH THE APPLICABLE STATUTORY SCHEME AND DECISIONS OF THIS COURT CONCERNING FEDERAL PREEMPTION**

The decision of the court of appeals is consistent with applicable decisions of this Court and reflects both the policies of the Communications Act and the direct application of settled law governing federal-state relationships under circumstances where federal and state regulations are inconsistent.

## **A. The Statutory Framework**

Congress intended that the interstate communications network be subject to strong national control and it gave the FCC expansive powers to assert that control. Thus, the FCC serves as “the single Government agency” with “unified jurisdiction” and broad regulatory authority over all forms of electrical communication.<sup>11</sup> Moreover, it “is confirmed by the language of the statute and by judicial decisions” that the Communications Act contemplates the

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<sup>11</sup> *U.S. v. Southwestern Cable*, 392 U.S. 157, 168 (1968) (citations omitted).

regulation of interstate communications "from its inception to its completion" at the ultimate destination.<sup>12</sup>

In particular, the Act directs the Commission "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151. The grant of jurisdiction covers not only the transmission of interstate and foreign communications, but also "all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission." 47 U.S.C. § 153(a) and (b). This basic authorization to determine what array of facilities is "adequate" or most "efficient," and what level of pricing is "reasonable," leaves the Commission a wide range of options in giving content to the overall statutory policy.<sup>13</sup>

Inextricable to the exercise of such broad powers is the ability to develop (as well as alter) federal communications policy responsive to changing conditions. As this Court observed in construing a similar statutory scheme involving the Interstate Commerce Commission:

"In fact, . . . this kind of flexibility and adaptability to changing needs and patterns . . . is an essential part of the office of a regulatory agency. [T]hey are

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<sup>12</sup> *U.S. v. AT&T*, 57 F.Supp. 451, 454 (S.D. N.Y. 1944), *aff'd*, *Hotel Astor, Inc. v. United States*, 325 U.S. 837 (1945).

<sup>13</sup> As we are reminded by this Court, the "Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation." *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956). As such, the FCC's authority is not limited "to those activities and forms of communication that are specifically described by the Act's other provisions." *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1968).

supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy."<sup>14</sup>

### B. The Federal Preemption Doctrine

The preemption doctrine is rooted in the Supremacy Clause, U.S. Const., Art. VI, cl. 2. As this Court's recent *Fidelity Federal* decision emphasizes, "preemption may be either express or implied".<sup>15</sup> It may be compelled by explicit statutory language or it may be implicitly contained in the basic purpose and overall structure of the legislation.<sup>16</sup>

Moreover, even where, as here, "Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law."<sup>17</sup> Such a conflict arises where "compliance with both federal and state regulations is a physical impossibility"<sup>18</sup> or where state law "stands as an obstacle to the accomplishment and execution of the full purposes

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<sup>14</sup> *American Trucking Ass'n, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967). See also *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036, 1049 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977).

<sup>15</sup> *Fidelity Federal S. & L. Ass'n v. de la Cuesta*, — U.S. —, 73 L. Ed. 664, 675 (1982).

<sup>16</sup> *Fidelity Federal*, *supra*, 73 L. Ed. 2d at 675. See also *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

<sup>17</sup> *Fidelity Federal*, *supra*, 73 L. Ed. 2d at 675. See also *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978). Accord, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977) ["Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict"].

<sup>18</sup> *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963) (hereinafter "*Florida Lime*").

and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).<sup>19</sup>

**C. Petitioners Ignore The Central Purpose Of The Act And Misconstrue The General Principles Of Federal Preemption**

In mounting their verbal attack over old terrain, Petitioners are necessarily forced into a highly constricted view of the Commission's authority under the Communications Act and a uniquely novel perception of the federal preemption doctrine. Neither view is supported by the cases.

Initially, Petitioners contend that the Commission may not formulate any federal telecommunications policy which effectively preempts state regulatory powers without express Congressional direction.<sup>20</sup> Thus, according to

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<sup>19</sup> Regulations promulgated by federal agencies like the FCC "have no less pre-emptive effect than federal statutes." *Fidelity Federal*, *supra*, 73 L. Ed. 2d at 675. Accord, *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979); *Free v. Bland*, 369 U.S. 663, 668 (1962).

<sup>20</sup> Indeed, LPSC's hyperbole on this point is seemingly boundless. In an effort to belittle what it perceives as the "self-generating determination of federal policy by an administrative agency," LPSC suggests that, wholly apart from its preemptive effect on state authority, the Commission simply cannot initiate any federal telecommunications policy without explicit or implicit statutory direction. LPSC Pet., p. 17. Not surprisingly, LPSC cites no judicial authority to support its proffered theory of administrative law. The suggestion, in fact, flies in the face of the entire regulatory regime which, as shown, establishes only a broad framework that affirmatively requires the Commission to "generate" and alter telecommunications policy to meet new and changing conditions. See cases cited at note 14, p. 9, *supra*. LPSC's view of the statutory scheme is, in fact, the very antithesis of the policy rationale for administrative agencies—i.e., "the ability to tailor broad legislative directives to fit specific problems. . . ." *North Carolina Utilities Commission v. FCC*, *supra*, 552 F.2d at 1049. If accepted, LPSC's view of the administrative process would virtually eviscerate the FCC's legitimate and necessary policymaking role.

LPSC, "[b]efore preemption by an administrative agency will be approved, the agency must show that each element of its action furthers a Congressional objective."<sup>21</sup> LPSC relies upon this Court's *Florida Lime* decision, arguing that it bars preemption "unless (1) the nature of the regulated subject matter permits no conclusion except that Congress intended preemption, or (2) in explicit terms, the 'Congress has unmistakably so ordained.'" LPSC Pet., p. 19.<sup>22</sup>

In urging this interpretation, LPSC conveniently side-steps the broad statutory power that is entrusted to the Commission to develop and implement a strong interstate communications system. (We discuss this at somewhat greater length in Section II, *infra*.) More pointedly here, however, LPSC simply misses the central holding of *Florida Lime*—a case involving a conflict between federal and California state standards governing the marketing of avocados.

As a prelude to deciding whether the State of California could constitutionally reject avocados which the U.S. Secretary of Agriculture (using a less restrictive standard) had certified to be marketable, the Court in *Florida Lime* emphasized that its ultimate conclusion depended upon whether, as a practical matter, the state regulation stood as a barrier to "the accomplishment and execution of the full purposes and objectives of Congress." 373 U.S. at 141, quoting *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941). Employing that precise test—not the one re-constructed by LPSC—the Court held

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<sup>21</sup> LPSC Pet., p. 18. Stated somewhat differently, Petitioner NARUC argues that the court below has sanctioned the creation of a new jurisdictional framework which "lacks the requisite Congressional stamp of approval. . . ." NARUC Pet., p. 16.

<sup>22</sup> Amici also principally rely on *Florida Lime*. See Amicus Curiae Briefs of Maryland Office of People's Counsel (p. 3) and the State of Arkansas and the Arkansas Public Service Commission (p. 6).

that the California regulation was not an obstacle to the federal program—because there was neither any actual conflict between the two schemes of regulation nor evidence of a congressional design to preempt the field. 373 U.S. at 141.

Accordingly, the factor that most clearly distinguishes *Florida Lime* from this case—and, in turn, makes the decision below fully consistent with *Florida Lime*—is the Court's focus in *Florida Lime* on whether or not the state and federal regulations could stand side by side. Expanding upon this point, the Court in *Florida Lime* noted that the "test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field. . . ." 373 U.S. at 142. In a statement that bears directly upon the instant case, the Court then concluded:

"A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce."<sup>28</sup>

In other words, contrary to LPSC's contentions, it is not even necessary to turn to the question of whether Congress ordained that the state regulation shall yield "unless it is first determined that" there is no "irreconcilable conflict" between the state and federal regulations. 373 U.S. at 146.

In the Communications Act, Congress envisioned a uniform and strong national communications system. While the Act recognizes the legitimate rate-making role of the states with respect to purely intrastate matters, the paramount objective is the provision of a "rapid, efficient,

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<sup>28</sup> 373 U.S. at 142-43.

Nation-wide" communications service.<sup>24</sup> Thus, a critical characteristic of telecommunications in this country is its essential universality; and, as to the particular matters under consideration here, it simply is not possible to meet the national policy objectives of the Communications Act in the face of conflicting federal and state standards. To phrase the matter differently, a nationwide policy designed to govern the provision of CPE simply cannot be implemented if individual states are permitted to impose regulations that would directly thwart the federal regulatory program.

As such, here, where the decision involves customer premises equipment to be interconnected with the *inter-state* telecommunications system, there is, indeed, an "irreconcilable conflict" between federal and state regulatory objectives. Having decided after an exhaustive decade-old proceeding that unregulated competition in the provision of CPE would best serve the objectives of the Act by promoting more efficient use of the interstate communications network, the FCC determined that state tariffing of CPE would directly undermine and frustrate the achievement of these objectives.

In sum, the Commission found that "unless there were two separate phone systems with one being used wholly intrastate, unbundled cost-based pricing for a piece of equipment at the federal level necessarily precludes any

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<sup>24</sup> 47 U.S.C. § 151. See also *General Telephone Co. of California v. FCC*, 413 F.2d 390, 401 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 888 (1969) ["fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication"]. Legislative history also clearly indicates that Congress intended to create an effective federal commission, one capable of implementing a unified national communications policy unhampered by potentially conflicting local policies. See, e.g., 78 Cong. Rec. 8822 (1934) (Remarks of Senator Dill).

other result by the states." *Final Decision*, 77 FCC 2d at 455.<sup>25</sup> To hold otherwise would, in effect, give the states a "veto" power over the development and implementation of national telecommunications policy.

Accordingly, rather than being in conflict with preemption principles articulated by this Court in *Florida Lime* and other cases,<sup>26</sup> the decision below is fully consistent with those principles. As this Court declared in *Florida Lime*, "[a] holding of federal exclusion of state law is inescapable" where, as here, compliance with different federal and state regulatory schemes would be a "physical impossibility." 373 U.S. 142-43. Obviously, a carrier or other entity engaged in interstate commerce could not offer customer premises equipment to be utilized in connection with the national telecommunications system on an unregulated, untariffed basis (pursuant to federal policy) while providing the same equipment under tariff (pursuant to contrary state regulation). It would be physically impossible.

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<sup>25</sup> That this condition presents an "irreconcilable conflict" is, therefore, self-evident. The FCC's policy of detariffing CPE would have minimal effect if it extended only to that CPE which had been offered in federal tariffs. Most CPE, while typically used in both interstate and intrastate communications, has traditionally been offered in state tariffs. In any event, the FCC's policy determination was that tariff requirements (whether federal or state) would frustrate the pricing flexibility, innovation, freedom of entry, and vigorous competition that the agency sought to promote in *Computer II*. Moreover, continued tariffing at the state level would perpetuate the opportunities for hidden subsidies and price discrimination that the FCC sought to eliminate by unbundling and detariffing CPE. In sum, state regulation of the identical terminal equipment the FCC has deregulated presents a classic jurisdictional clash that, under both the Communications Act and general principles of federal preemption, must be resolved in the FCC's favor.

<sup>26</sup> See pp. 9-10, *supra*.

**II. THE DECISION BELOW IS ALSO FULLY CONSISTENT WITH DECISIONS OF OTHER COURTS OF APPEALS**

Congress created the Federal Communications Commission in 1934 to expand and enhance *interstate* communications. While the Commission's jurisdiction does not extend to matters purely *intrastate*, the clear thrust of the Act is to give the Commission the predominant role in ensuring the nation's communications needs.

Throughout the nearly fifty years this regulatory scheme has been in place, certain conflicts have inevitably arisen between federal and state regulation. When they have, the courts have consistently construed Sections 2(a) and (b) of the Act to give the FCC authority over facilities used in both interstate and intrastate communications—principally because, in practice, it is often impracticable to separate communications services and equipment along discrete inter- and intra-state lines.

Seeking to dispute or avoid this unmistakable precedent, Petitioner NARUC engages in a highly strained effort to find a conflict between the District of Columbia Circuit in this case and the Fourth Circuit in two interrelated cases decided in the mid-1970's. Upon examination, however, it is clear that not only is there not a conflict between the D.C. Circuit and the Fourth Circuit in the specific cases relied upon by NARUC, but no other circuit court decision is in conflict with the decision below. This absence of any conflict among the circuits—reflected, in fact, in long-followed consistent judicial decision—provides additional strong support for this Court not to grant plenary review.

Significantly, even NARUC is forced to acknowledge that the decision below is not “a case of first impression”—because, in its own words, the “Fourth Circuit has twice exhaustively examined the same issue.” NARUC

Pet., p. 11. It is also significant that the court below regarded its own analysis of the preemption issue as being in full "accord" with what it characterized as "two leading cases . . . which . . . recognized that state regulation which impedes a federal regulatory goal must yield to the federal scheme." Pet. App. at A-36, 693 F.2d at 214. Those cases are the same cases NARUC now claims are in conflict with the decision below—*North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (*NCUC I*) and *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977) (*NCUC II*).

It is evident, therefore, that in order to paint a conflict between the decision below and the *NCUC* cases, NARUC must take a decidedly unique view of what the *NCUC* cases, in fact, held. It is a view that cannot be sustained—contrived only to meet one of the leading tests of this Court for granting review.

In general, the *NCUC* cases established the right of telephone subscribers to interconnect their own terminal equipment with the national telephone network—pursuant to a federal policy and equipment registration program formulated by the Commission in the mid-1970's to enhance competition in the terminal equipment market.<sup>27</sup> Despite this federal policy permitting interconnection of terminal equipment, several state regulatory commissions sought to forbid interconnection of non-carrier-supplied terminal equipment with local exchanges—except where such equipment was used exclusively for interstate communication. Because "separation of terminal equipment used exclusively for local communication is a practical

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<sup>27</sup> Terminal equipment and customer premises equipment (CPE) are essentially synonymous terms—comprising, for purposes of both the *NCUC* cases and the instant case, such devices as the ordinary telephone, data sets, answering devices, key systems, PBX's and computer terminals.

and economic impossibility, the proposed state rules would have scuttled the [new] federal interconnection policy." *NCUC II*, 552 F.2d at 1043. Accordingly, the Fourth Circuit upheld the Commission's preemptive authority to determine the terms on which consumers may attach non-carrier supplied CPE to transmission facilities used for both interstate and intrastate communications—recognizing, in the same fashion as the court below, that state regulation which impedes a federal regulatory goal must yield to the federal scheme.

Nevertheless, in attempting to build a distinguishing wedge between the *NCUC* cases and the decision below, NARUC claims that the former specifically limited the Commission's preemptive power to the terms surrounding the offering of equipment and facilities—but not to rates, apparently assuming that rates are always a divisible element of equipment and facilities. Thus, in NARUC's view, the D.C. Circuit goes beyond the *NCUC* cases because it approves a Commission order that, contrary to Section 2(b) of the Act, affects local rates or pricing of equipment. NARUC Pet., pp. 12-13.<sup>28</sup>

However, as the court below found, Section 2(b) does not restrict preemption in this case. The *Computer II* decision does not set rates for intrastate communications

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<sup>28</sup> LPSC similarly relies on Section 2(b). See LPSC Pet., pp. 22-24. In fact, both LPSC and NARUC point out (LPSC Pet., pp. 23-24; NARUC Pet., pp. 15-16) that Section 2(b) was enacted in response to this Court's *Shreveport* decision [*Houston, E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342 (1914)]—a decision which Congress disapprovingly read to permit federal agencies to set local rates based on the indirect effects such rates might have on interstate service. *Shreveport* upheld an ICC order that effectively required the revision of intrastate railroad rates that were lower than rates for comparable interstate rail services, so as to remove the resulting discrimination against interstate commerce. No such agency order is involved here. The FCC has neither sought to set rates for intrastate services nor asserted jurisdiction to regulate matters of state concern owing to any claimed intrastate discrimination against interstate business.

services or facilities. Instead, the Commission has exercised its direct authority to determine the regulatory treatment of CPE used for interstate communications. As the court of appeals explained:

"The operative principle in this case is precisely the principle that demanded state preemption in the *NCUC* cases. There, the preemption of state regulations that restricted interconnection was justified because those regulations impeded the validly adopted federal policy of unrestricted interconnection. Similarly, in *Computer II* preemption of state tariffs on CPE is justified because staff tariffs would interfere with the consumer's right to purchase CPE separately from transmission service and would thus frustrate the validly adopted federal policy. In *Computer II*, the federal-state conflict would stem, as it did in the *NCUC* cases, from the practice of using CPE jointly for interstate and intrastate communication. The conflicting state policy, meant to affect only intrastate use, would unavoidably affect the federal policy adversely. Therefore, here, as in *NCUC I* and *II*, the state regulatory power must yield to the federal."<sup>29</sup>

NARUC, while apparently accepting the general principle of the *NCUC* cases, argues that preemption of CPE *rate* regulation is a different matter. However, Sections 2(a) and (b) of the Act allocated federal and state authority with respect to both "charges [and] . . . facilities" in precisely the same terms. Moreover, the *NCUC* cases specifically involved preemption of state tariffed

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<sup>29</sup> Pet. App. at A-38, 693 F.2d at 216. LPSC's suggestion (LPSC Pet., p. 16) that the court of appeals' analysis was deficient on this score because it did not probe more deeply into the Commission's substantive findings regarding the regulation of CPE is also erroneous. When a federal agency "promulgates regulations intended to pre-empt state law, the court's inquiry is . . . limited" to whether the agency exceeded its statutory authority or acted arbitrarily. *Fidelity Federal*, *supra*, 73 L. Ed. 2d at 675. See also *United States v. Shimer*, 367 U.S. 374, 381-82 (1961).

charges for terminal equipment used for interconnection. Similarly, the rates in question here are for individual pieces of CPE used interchangeably for both interstate and intrastate transmission, and conflicting federal and state policies with respect to such equipment are no more feasible or tolerable where equipment rates are involved than where equipment interconnection is involved.<sup>30</sup> The court below so found. Pet. App. at A-39, 693 F.2d 216.<sup>31</sup>

Where the equipment used or service being performed (including the terms and charges therefor) cannot be regarded as purely intrastate but are, instead, fully integrated into the interstate communications system (as well as intrastate communications) federal preemption is necessary and appropriate in situations where there is a conflict between federal and state regulatory policies. That is what the court of appeals held in this case. It is

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<sup>30</sup> The Act itself, it can be noted, further recognizes the need for "federal superintendence" of such dual-use equipment even in rate matters by giving the FCC the final authority to apportion costs of common carrier property between interstate and intrastate operations. Section 410(c), 47 U.S.C. § 410(c).

<sup>31</sup> Although relying principally on Section 2(b), Petitioners also contend that Section 221(b) of the Act stands as a bar to federal preemption in these circumstances. See LPSC Pet., pp. 23-25; NARUC Pet., p. 11. But, as the courts have uniformly held, Section 221(b) has a highly specific and narrow focus—i.e., to preserve state authority over those local telephone exchanges that serve metropolitan areas that encompass more than one state. Since Section 221(b) is designed to cover only those limited circumstances, it is totally inapposite here. See *NCUC I*, *supra*, 537 F.2d at 795; *NCUC II*, *supra*, 552 F.2d at 1045; *New York Telephone Co. v. FCC*, 631 F.2d 1059, 1064-65 (2d Cir. 1980); *Puerto Rico Telephone Co. v. FCC*, 553 F.2d 694, 698-99 (1st Cir. 1977). See also S. Rep. No. 781, 73rd Cong., 2d Sess., p. 5 (1934), which expressly states that Section 221(b) was intended to enable state commissions "to regulate exchange services in metropolitan areas overlapping state lines." The Court below also adopted this view. Pet. App. at pp. A-39 - A-40, 693 F.2d at 216-17.

also what the Fourth Circuit held in the *NCUC* cases.<sup>32</sup> And it is what other circuits have consistently held in other cases where the issue has been addressed.

For example, rejecting the same jurisdictional argument that was raised in the *NCUC* cases, the First Circuit in *Puerto Rico Telephone Co. v. FCC*<sup>33</sup> upheld the FCC's authority to prohibit the Commonwealth of Puerto Rico from barring carriers from restricting the attachment of customer-provided equipment to the telephone network even though the equipment would be used in part to provide intrastate service.<sup>34</sup> Similarly, the Second Circuit in *N.Y. Telephone Co. v. FCC*<sup>35</sup> upheld the FCC's assertion of jurisdiction over local exchange service when used in connection with interstate foreign exchange (FX) and common control switching arrangement facilities (CCSA).<sup>36</sup>

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<sup>32</sup> This Court denied writs of certiorari in both *NCUC* cases. No reason is presented to suggest a change of circumstances which would make grant of a writ more appropriate at this time. Indeed, the most significant development in the intervening years has been that three additional circuits (including the D.C. Circuit) have affirmed the jurisdictional approach in the *NCUC* cases.

<sup>33</sup> 553 F.2d 694 (1st Cir. 1977).

<sup>34</sup> In the words of the First Circuit:

"We think that the clear import of the Communications Act, as it has been construed by the FCC and by the courts for many years, is that no matter how frequently or infrequently a subscriber places interstate calls, he is entitled to have the conditions placed on access to the interstate telephone system measured against federal standards of reasonableness under § 201 [of the Act]. We are therefore led to the conclusion that § 201 displaced the residual state jurisdiction guaranteed by [2(b)] since the interconnection policies adopted by the FCC and [Puerto Rico] are incompatible." *Puerto Rico Telephone Co. v. FCC*, *supra*, 553 F.2d at 700.

<sup>35</sup> 631 F.2d 1059 (2d Cir. 1980).

<sup>36</sup> After quoting with approval the finding of the Fourth Circuit in *NCUC I* that Section 2(b) of the Act does not "sanction any state regulation, formally restrictive only of intrastate communica-

Furthermore, even though not dealing directly with Section 2(b), the Second Circuit recently confirmed the paramount goal of the Communications Act to achieve a unified interstate communications system by upholding the FCC's preemption of New York State's regulation of television master antenna systems. *New York State Commission on Cable Television v. FCC*, 669 F.2d 58, 64-66 (2d Cir. 1982).<sup>37</sup> Finally, it should be noted that prior to this case the D.C. Circuit joined the Second Circuit in concluding that the FCC has authority over foreign and common control switching arrangement facilities that are used for both interstate and intrastate communications. *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978).<sup>38</sup>

In sum, the decision of the court of appeals is fully consistent with long-established general principles of federal preemption set forth in prior decisions of this Court, and, in addition, is in complete accord with the decisions of all other circuit courts that have specifically addressed the Commission's preemptive authority under the Communications Act. Petitioners cannot deny that state tar-

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tion, that in effect encroaches substantially upon the Commission's authority under Sections 201 through 205" (537 F.2d at 793), the Second Circuit concluded that:

"Even if the local exchange service is separable technologically and in terms of cost assessment from the dedicated private line in FX and CCSA service, there is no doubt that the [New York Telephone] surcharge on interstate FX/CCSA users . . . substantially affects the conduct or development of interstate communication and encroaches upon FCC authority." 631 F.2d at 1066.

<sup>37</sup> Cf. *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979) [where Second Circuit upheld FCC's preemption of state price regulation of pay cable television programming].

<sup>38</sup> Cf. *NARUC v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) [where D.C. Circuit upheld FCC preemption of state regulation of non-common carrier spectrum allocation].

iffing of dual-use CPE would make "compliance with both federal and state regulations . . . a physical impossibility." *Florida Lime, supra*, 373 U.S. at 142-43. Consequently, under undisputed principles of federal preemption, the court of appeals' ultimate approval of the Commission's primary authority over dual-use CPE was correct and need not be reviewed by this Court.

### CONCLUSION

For the reasons stated above, the petitions for writ of certiorari should be denied.

Respectfully submitted,

JOSEPH M. KITTNER

CARL R. RAMEY

McKENNA, WILKINSON & KITTNER

1150 Seventeenth St., N.W.

Washington, D.C. 20036

(202) 861-2600

JOHN S. VOORHEES, P.C.

HOWREY & SIMON

1730 Pennsylvania Ave., N.W.

Washington, D.C. 20006

(202) 783-0800

*Counsel for Computer and*

*Business Equipment*

*Manufacturers Association*

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**APPENDIX****RELEVANT STATUTORY MATERIAL****§ 151. Purposes of chapter; Federal Communications Commission created**

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

**§ 152. Application of chapter**

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

(b) Except as provided in section 224 of this title and subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201-205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2)-(4) of this subsection.